

A "retailer maintaining a place of business in Illinois" as described in 86 Ill. Adm. Code 150.201(i), is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801 (This is a GIL).

October 26, 2001

Dear Xxxxx:

This letter is in response to your letter dated September 21, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

PERSON of your Problems Resolution Office suggested I direct my inquiry to you relating to nexus.

My client is requesting confirmation on whether or not it has nexus with Illinois for income/franchise tax reporting purposes. PERSON suggested we could include Form NUC-1 without disclosing the client's name to assist you in collecting the information you will need in making this determination.

Since Form NUC-1 does not seem to solicit some information which may be relevant in your determination, I am adding additional information here. The company ships farm products from its Wisconsin location. The company does not have any employees working in Illinois, nor does it maintain an office or any inventory in Illinois. The company purchases vegetables from growers in Illinois. The contacts with the Illinois growers are by telephone or fax machine.

The company sells farm products to customers in Illinois. All of the contacts with Illinois customers occur by telephone or fax machine.

The company does not own any trucks, nor has any employees delivering or picking up the products. All transportation of products purchased and hauled to the company's Wisconsin location, and all deliveries of products to customers in Illinois, are done by independent truck drivers. These drivers are not employees. They clearly are independent contractors. For example, they own their own trucks. They drive for their other customers in addition to this company. During the shipping season, the independent drivers call in to see if there are loads available, or sometimes the company calls them. Each driver has the full discretion whether to accept or reject a

particular load. You should assume for these purposes that all drivers will be classified as independent contractors.

The trucker rather than the company is responsible for unloading the shipment. The trucker gets the unloading done in a variety of ways. Sometimes the trucker does it himself or with the customer's assistance. Other times the customer insists that a local firm be hired to do it. Other times the trucker finds local free lancers who hang around the dock looking for work. The cost for hiring the unloading service is negotiable between the company and the trucker. The company tries to get the trucker to handle it out of the negotiated freight charges. But sometimes the trucker is surprised by the need to incur the expense and calls the company up looking for reimbursement on the spot, which sometimes forces the company to advance the money in order to avoid a problem with the customer. Since the company does not hire the service, the correct analysis should be that the unloading person is not the company's agent.

The company sells some products to customers of an Illinois broker. The Illinois broker locates customers willing to buy loads from the company. The Illinois broker originally was a sole proprietor but has been incorporated for the last several years. The broker is not involved in purchasing. The broker does not inspect products which have been sold, nor collect accounts receivable from customers. The company is not aware of any post-sale activities carried on by the broker. The company pays the Illinois broker a commission measured by the quantity sold. In the year 2000, the company paid approximately \$8,000 in brokerage fees to this corporate broker.

The only visits to Illinois by employees consists of one day every 3 or 4 years to visit an Illinois grower, and one day every 2 or 3 years to visit an Illinois customer. In other words, the company averages 2 days every 3 years of physical contact with Illinois. The company has reviewed its history and has found no other contacts occurring with Illinois.

Based on our understanding of nexus rules, my client would not have nexus with Illinois. Even if its activities did constitute nexus, they would seem protected under Public Law 86-272. However, if you conclude that our position is incorrect, then my client requests treatment under your voluntary disclosure program. The company has never previously filed returns with Illinois, nor ever received any inquiries from your department of revenue.

My client also requests advice with regard to Illinois sales and use tax compliance. Does the company have nexus for sales and use tax purposes? The company sells strictly to wholesalers who would be eligible for a purchase for resale exemption. If you determine the company does have sales tax nexus, does the company need to obtain a signed exemption certificate to document the exemption?

Your early written response will be very much appreciated. If you do need further information in order to process our request, please be sure to call the undersigned.

In the context of a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

Persons who exclusively make sales for resale are not required to register in Illinois as all of their sales are not subject to tax. However, if such persons make even minimal retail sales, they are required to register with Illinois assuming they have nexus.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis  
Associate Counsel

MAJ:msk  
Enc.